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JURISDICTION

SUPREME COURT

Some plaintiffs are pursuing an angle on personal jurisdiction that could circumscribe the U.S. Supreme Court's efforts to slow forum-shopping, attorneys Jessica D. Miller and Geoffrey M. Wyatt and law clerk Joshua P. Bussen say. If accepted, this approach could strip the U.S. Supreme ruling in *Daimler v. Bauman* of most of its force, at least with respect to companies that do business nationwide, the authors say. The authors urge the Third Circuit to use pending cases to revisit the issue of consent jurisdiction, and expressly hold that the quarter-century-old opinion in *Bane v. Netlink* is no longer good law in light of *Daimler*.

Can States Circumvent *Daimler* by Requiring Out-Of-State Businesses To Agree to Blanket Consents to Personal Jurisdiction?



By Jessica D. Miller, Geoffrey M. Wyatt and Joshua P. Bussen

In *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the Supreme Court clarified the limitations on general personal jurisdiction. Specifically, the Court held that contact with a state – even ''continuous and systematic'' contact – is not by itself enough to exercise general personal jurisdiction over a corporation, contrary to the conclusions of some lower courts. *Id.* at 750-53. Rather, the dispositive question is whether a corporation's ''affiliations with the State are so 'continuous and systematic' as to render [the defendant] *essentially at home*'' – the paradigmatic examples being the state of incorporation and principal place of business. *Id.* at 761 (emphasis added). As a formal matter, the Court did not close the door on the possibility that another situation could arise that would render a corporation ''essentially at home.'' But it noted that such a situation would present an ''exceptional case.'' *Id.* at 761 n.19.

The Court explained the need for this line drawing in terms of traditional personal-jurisdiction principles. As it noted, the plaintiffs before it ''would have [the Court] . . . approve the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business.' '' *Id.* at 761. The Court rejected this ''formulation'' as ''unacceptably grasping.'' *Id.* After all, if general jurisdiction could be based solely on regular business activity, ''the same global reach would presumably be available in ev-

ery . . . State,'' and such an ''exorbitant exercise[] of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' '' *Id.* at 761-62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

Because *Daimler* rejected the broader theories of general jurisdiction employed by some courts – which were content to exercise jurisdiction as long as there was a showing of ''continuous and systematic'' conduct in the forum – the effect has been to circumscribe the forum-shopping efforts of enterprising plaintiffs' lawyers. In response, some plaintiffs have pursued a different angle on personal jurisdiction, arguing that companies either expressly or impliedly consent to personal jurisdiction in a state by registering to do business there.

This approach, if accepted, could potentially strip *Daimler* of most of its force, at least with respect to companies that do business nationwide, as to which the Court found it ''unacceptably grasping'' to suggest that the mere fact that a business engages in substantial business in a state should subject it to all-purpose jurisdiction. 134 S. Ct. at 761. Nevertheless, the argument of jurisdiction by consent has prompted divergent rulings by district courts, as several post-*Daimler* district court decisions in the Third Circuit illustrate.

Specifically, district courts in each of the states that comprise the Third Circuit – Pennsylvania, Delaware and New Jersey – have addressed consent jurisdiction. These decisions offer competing interpretations and, at least in some cases, expressly disagree with one another. The following four decisions illustrate the current state of the law and the critical need for the Third Circuit to clarify the law and bring it into line with the principles set forth in *Daimler*.

Pennsylvania

Most recently, in *Bors v. Johnson & Johnson*, No. CV 16-2866, 2016 BL 309402 (E.D. Pa. Sept. 20, 2016), the Eastern District of Pennsylvania held that, notwithstanding *Daimler*, a corporate defendant may be subject to personal jurisdiction in Pennsylvania based solely on the fact that it did business there because the Commonwealth's business-registration statute includes an express consent to personal jurisdiction. *See* 42 Pa. C.S.A. § 5301(a)(2)(i) (2016). In *Bors*, the defendant was incorporated in Delaware and maintained its principal place of business in California; it did not ''have an address, phone number, or bank account in Pennsylvania''; and it did not sell, ship or even distribute products in Pennsylvania. It was undisputed that the defendant's *only* contact with Pennsylvania was its registration to do business in the state. *Id.*

Despite this paucity of even *unrelated* contacts to Pennsylvania, the court concluded that registration under the statute sufficed to consent to personal jurisdiction in all cases and rendered Daimler irrelevant. It relied chiefly on *Bane v. Netlink*, 925 F.2d 637 (3d Cir. 1991), which likewise had held (more than two decades before *Daimler* was decided) that Pennsylvania's requirement that foreign corporations consent to general jurisdiction before doing business in the state was constitutional. *See id.* at 640-41.

One of the defendants had argued that *Bane*'s rule could no longer be sound in light of the Supreme Court's clarification of general jurisdiction principles in *Daimler*. The court however, disagreed, holding that even ''companies with ***no business ties or contacts*** in Pennsylvania'' are subject to all-purpose jurisdiction if they register with the state as a foreign corporation. *Id.* It reasoned that ''exercise of general jurisdiction based on a corporation's consent differs from general jurisdiction established when a corporation is 'essentially at home' in the forum state''; thus, *Daimler* simply had no bearing on consent jurisdiction. Accordingly, because the defendant had – in the court's view ''purposefully avail[ed] itself of the privilege of conducting activities within the forum'' by registering to do business there, due process was satisfied.

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Delaware

Delaware's business-registration statute contains no express-consent provision respecting personal jurisdiction, *see* 8 Del. C. § § 371, 376 (2016), but courts nevertheless exercised personal jurisdiction over defendants in that state as well on the ground that registering to do business implies consent to such jurisdiction. But the federal district court judges have split on the issue, with their disagreement centering on the implication of *Daimler* for the consent theory of jurisdiction.

In *AstraZeneca AB v. Mylan Pharmaceuticals*, 72 F. Supp. 2d 549 (D. Del. 2014), Judge Sleet of the U.S. District Court for the District of Delaware rejected a consent theory of jurisdiction, relying heavily on the Supreme Court's reasoning in *Daimler*. In that case, the defendant Mylan Pharmaceuticals's principal place of business was in West Virginia, where it was also incorporated. *Id.* at 551. Mylan had no property or employees in Delaware and conducted next to no sales there. *Id.* at 552.

The plaintiff asserted that the court had general jurisdiction over Mylan based on either minimum contacts or consent by registration to do business. *Id.* at 553-55. The court made quick work of the minimum-contacts argument concluding under *Daimler*'s framework that Mylan could not reasonably be considered ''at home'' in Delaware merely because it registered to do business there. *Id.* at 554.

The court then considered whether Mylan had ''consented'' to jurisdiction in the state. It first acknowledged Third Circuit precedent ''uph[olding] a finding of general jurisdiction on statutory registration grounds alone,'' expressly citing *Bane v. Netlink*, *see* 72 F. Supp. 3d at 555-56, the decision that underpinned the Eastern District of Pennsylvania's decision in *Bors*. But Judge Sleet also noted that ''there is little guidance as to *Daimler*'s impact, if any, on this question.'' *Id.*

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Judge Sleet thus decided to address the question of *Daimler*'s impact on consent theories of jurisdiction as a matter of first impression, concluding that, ''[j]ust as minimum contacts must be present so as not to offend 'traditional notions of fair play and substantial justice,' the defendant's alleged 'consent' to jurisdiction must do the same.'' *Id.* at 556. As such, Judge Sleet concluded that the ''Supreme Court's discussion of due process in *Daimler*'' must ''inform[] . . . the court's analysis'' of consent. *Id.* Any other rule, he concluded, would produce the same state of affairs of general jurisdiction in every state for corporate defendants that do business nationwide that the Supreme Court deemed to be intolerable in *Daimler*. *See id.* at 556-57. Thus, for the same reasons that Mylan's contacts with Delaware were insufficient to support general jurisdiction under a minimum-contacts theory, Judge Sleet rejected the consent theory as well. *Id.* at 557. Nevertheless, Judge Sleet went on to find personal jurisdiction on specific-jurisdiction grounds. *See id.*

In another decision involving Mylan as a defendant in the same court just a few months later, however, Judge Stark expressly disagreed with Judge Sleet's ruling on general jurisdiction on the same set of facts. Specifically, in *Acorda Therapeutics Inc. v. Mylan Pharmaceuticals Inc.*, 78 F. Supp. 3d 572 (D. Del. 2015), Judge Stark agreed that Mylan was not ''at home'' in Delaware, making general jurisdiction based on a minimum-contacts analysis impermissible under *Daimler*'s framework. *See id.* at 582-83. With respect to consent-based general jurisdiction, however, Judge Stark reached the opposite conclusion. As he explained, ''[o]ne manner in which a corporation may be deemed to have consented to the jurisdiction of the courts in a particular state is by complying with the requirements imposed by that state for registering or qualifying to do business there,'' *id.* at 584, specifically citing the Third Circuit's decision in *Bane*, *see id.* at 585. Judge Stark then acknowledged a circuit split over whether mere registration to do business can be construed as consent to jurisdiction, *see id.* at 585-86, and further acknowledged that Delaware's business-registration statutes do not contain an express consent to personal jurisdiction, *see id.* at 587. Nevertheless, he noted that the Delaware Supreme Court itself (prior to *Daimler*) had construed the statutes to effect such consent upon registration. *Id.* (citing *Sternberg v. O'Neil*, 550 A.2d 1105, 1115-16 (Del. 1988)).

Judge Stark specifically disagreed with Judge Sleet's conclusion that *Daimler* casts the consent doctrine in a new light that would require reconsideration of old precedents. He explained that *Daimler* did ''not expressly address consent.'' *Id.* at 589. And although he acknowledged that the effect of this divergent approach would be to make corporate defendants that do business nationwide subject to general jurisdiction in every state, he insisted that this outcome was not foreclosed by *Daimler* because a company's voluntary adherence to a business-registration statute means that there is ''no uncertainty as to the jurisdictional consequence of its actions.'' *Id.* at 591.

Judge Stark did acknowledge that his conclusion was ''at one level in tension with the holding in *Daimler* that it would be 'unacceptably grasping' to find general jurisdiction'' in every state over national businesses. *Id.* But he concluded that this tension was inevitable because *Daimler* had not done away with consent-based jurisdiction; thus, ''this result, though odd, is entirely permissible.'' *Id.* Judge Stark then went on to hold, as had Judge Sleet, that personal jurisdiction could in any event be exercised on the basis of specific jurisdiction. *Id.* at 592-97. (Notably, the Federal Circuit affirmed the personal jurisdiction rulings in both *AstraZeneca* and *Acorda* in a consolidated appeal, but did so only on specific-jurisdiction grounds and did not address general jurisdiction. 817 F.3d 755 (Fed. Cir. 2016).)

New Jersey

Finally, New Jersey district courts are similarly conflicted, but along slightly different lines. All agree that general jurisdiction by consent does not apply to businesses merely by virtue of their registration in New Jersey, which has registration statutes, like Delaware's, that do not provide explicitly for personal jurisdiction. N.J.S.A. § § 14A:13-3(1), 14A:4-1, 14A:4-2. But some have held that consent can be inferred from registration if the registered business does some business in the state. One recent decision – *Display Works, LLC v. Bartley*, 182 F. Supp. 3d 166 (D.N.J. Apr. 25, 2016) – explored this disagreement and concluded that consent should not be inferred from registration, regardless of whether the company does business in the state, again finding *Daimler* instructive. The court began by holding that the Third Circuit's 1991 decision in *Bane* is still valid law. But it also held that *Bane* only applied where the state registration statute explicitly requires consent to jurisdiction. *See id.* It noted that some District of New Jersey decisions would infer consent by businesses that not only registered but also did some actual business in New Jersey. *See id.* But it concluded that these decisions rested on an ''outmoded way of thinking about jurisdiction,'' one that ''Daimler seriously challenged.'' *Id.* at *8. The court put it simply; were registration sufficient to infer consent, ''*Daimler*'s limitation on the exercise of general jurisdiction to those situations where 'the corporation is essential at home' would be replaced by a single sweeping rule: registration equals general jurisdiction. That cannot be the law.'' Accordingly, it read *Bane* as limited to circumstances involving express consent to general jurisdiction and declined to infer consent under statutes that do not contain such a provision – regardless whether the company did business in New Jersey.

Consent Jurisdiction Is Inconsistent with *Daimler*

Disagreement among the Third Circuit district courts in these cases underscores the need for appellate guidance on the shape of the ''consent'' doctrine of general jurisdiction after *Daimler*. At present, the cases suggest several different and irreconcilable approaches. The best approach – the one that is most consistent with the Supreme Court's reasoning in *Daimler* – is the one that rejects the notion that a blanket ''consent'' to jurisdiction as part of registering to do business in a state suffices to establish general jurisdiction for all claims filed by any person anywhere in the country. After all, *Daimler* itself rejected the idea that corporations with a nationwide business should be subject to general jurisdiction everywhere as unacceptably ''grasping'' and incompatible with due-process concerns of notice and fairness.

Even the pro-consent courts expressly acknowledge that their holdings are in significant ''tension'' with *Daimler*'s expressed policy concerns. *E.g.*, *Acorda Therapeutics*, 78 F. Supp. 3d at 591. And while these courts have taken the position that this tension can be reconciled because businesses have notice that they will be subject to general jurisdiction by registering to do business, *e.g.*, *id.*, this sort of notice is formalistic in the extreme. After all, a corporation would have no notice of what suits could be brought against it in the jurisdiction, contrary to one of the key principles underlying *Daimler* – i.e., that businesses need to be able to '' 'structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' '' 134 S. Ct. at 762. In other words, the due-process concerns reflected by *Daimler* entail not only notice but fairness – and the latter entails some limitations on where a defendant may be subject to all-purpose jurisdiction.

Notably, these fairness concerns are at odds with the doctrine of ''consent'' based on registration regardless of whether the registration statute at issue entails an express consent or not. Express consents are arguably somewhat less problematic than consent inferred from the act of registering to do business (or doing business) in a particular state from the standpoint of notice. But express consents do not address the fairness concerns at the heart of the *Daimler* opinion, especially in light of the fact that a business wishing to do business in a state with an express-consent provision has no real option of refusing consent other than to abandon its plans to conduct a nationwide business altogether.

In light of these concerns, the time is ripe for the Third Circuit to revisit the issue of consent jurisdiction and expressly hold that its quarter-century-old opinion in *Bane* is no longer good law in light of the Supreme Court's recent clarification of general jurisdiction principles in *Daimler*.

  PSLR ISSN 0092-7732